

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LONNIE RAY CARTER,) CASE NO. C09-0505-MJP-MAT
)
Plaintiff,)
)
v.) REPORT AND RECOMMENDATION
)
THOMAS C. PAYNTER, et al.,)
)
Defendants.)
_____)

INTRODUCTION

Plaintiff proceeds *pro se* and *in forma pauperis* (IFP) in this 42 U.S.C. § 1983 civil rights case. The Court previously dismissed claims brought against a number of named defendants. (Dkts. 99 & 102.) Now before the Court is a motion to dismiss filed by defendant Richard Gil Kerlikowske. (Dkt. 93.) For the reasons described below, the Court recommends that the motion to dismiss be GRANTED, and plaintiff's claims against Kerlikowske be DISMISSED.

BACKGROUND AND DISCUSSION

Defendant Kerlikowske seeks dismissal for failure to state a claim upon which relief can

01 be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). On a Rule 12(b)(6) motion to
 02 dismiss, the Court must accept all of the material allegations in plaintiff's complaint as true and
 03 liberally construe those facts in the light most favorable to plaintiff, as a *pro se* litigant. See
 04 *Oscar v. University Students Co-op Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992); *Jones v.*
 05 *Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984). "Dismissal can be
 06 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a
 07 cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.
 08 1988).

09 Plaintiff avers claims pursuant to 42 U.S.C. § 1983. In order to sustain a § 1983 claim,
 10 a plaintiff must show (1) that he suffered a violation of rights protected by the Constitution or
 11 created by federal statute, and (2) that the violation was proximately caused by a person acting
 12 under color of state or federal law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Crumpton v. Gates*,
 13 947 F.2d 1418, 1420 (9th Cir. 1991).

14 Plaintiff alleges the existence of a murder plot against him by a group of individuals to
 15 be acted upon following his release from prison in or around August 2008. (See generally Dkt.
 16 13.) He states that, in June 2006, he sent Kerlikowske, former Chief of the Seattle Police
 17 Department, a letter regarding the murder plot. (*Id.* at 42-43.)¹ Plaintiff avers that
 18 Kerlikowske failed to respond to or investigate the allegations set forth in the letter, and further
 19 failed to properly supervise, train, and inform Seattle Police Department employees with
 20 respect to the murder plot. (*Id.* at 42-44, 51-54.) Plaintiff appears to assert racial motivation

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 22 ¹ Due to errors in numbering, the page numbers provided by plaintiff in his complaint do not in every instance match those of the page numbers for the cited docket entry. (Dkt. 13). For consistency, the Court cites herein only the docket entry page numbers.

01 on the part of Kerlikowske. (*Id.* at 49-50, 53-54.) Plaintiff also asserts that Kerlikowske
02 failed to respond to or act on an additional letter apparently outlining grievances against one of
03 plaintiff's attorneys. (*Id.* at 43.) Plaintiff argues that Kerlikowske's failure to act violated his
04 Fifth, Eighth, Thirteenth, and Fourteenth Amendment rights, and his rights under 42 U.S.C. §§
05 1981 and 1985(c). (*Id.* at 53-55.) However, as argued by defendant and for the reasons
06 discussed below, plaintiff's complaint does not suffice to state a claim under § 1983.

07 A plaintiff in a § 1983 action must allege facts showing how defendants individually
08 caused or personally participated in causing the harm alleged in the complaint. *Arnold v. IBM*,
09 637 F.2d 1350, 1355 (9th Cir. 1981). A plaintiff may not hold supervisory personnel liable
10 under § 1983 for constitutional deprivations under a theory of supervisory liability. *Taylor v.*
11 *List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Rather, a plaintiff must allege that a defendant's
12 own conduct violated the plaintiff's civil rights. Here, plaintiff in part challenges
13 Kerlikowske's role as a supervisor over other members of the Seattle Police Department.
14 (Dkt. 13 at 43-44, 51-54.) Accordingly, because plaintiff seeks relief against Kerlikowske
15 under a theory of supervisory liability, his claim should be dismissed.

16 Plaintiff's claims against Kerlikowske as a whole also suffer from an additional defect.
17 Vague and conclusory allegations are subject to dismissal. *See Moss v. United States Secret*
18 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (“[B]are assertions . . . amount[ing] to nothing more
19 than a “formulaic recitation of the elements” of a constitutional discrimination claim,’ for the
20 purposes of ruling on a motion to dismiss, are not entitled to an assumption of truth.”) (quoting
21 *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1951 (2009) (quoting *Bell Atlantic Corp. v.*
22 *Twombly*, 550 U.S. 544, 555 (2007))); *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992)

01 (“Vague and conclusory allegations of official participation in civil rights violations are not
02 sufficient to withstand a motion to dismiss.”) (quoting *Ivey v. Board of Regents of Univ. of*
03 *Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). Moreover, “for a complaint to survive a motion to
04 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content,
05 must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss*, 572 F.3d at 969
06 (quoting *Iqbal*, 129 S.Ct. at 1949).

07 In this case, plaintiff does not explain how Kerlikowske’s failure to respond to or take
08 action in relation to letters addressing his belief that a group of private citizens sought to murder
09 him upon his eventual release from prison, and containing complaints about an attorney,
10 constituted a violation of his constitutional or federal statutory rights. As argued by defendant,
11 there does not appear to be any support for such a proposition. *See, e.g., DeShaney v.*
12 *Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195-97 (1989) (“As a general matter,
13 then, we conclude that a State’s failure to protect an individual against private violence simply
14 does not constitute a violation of the Due Process Clause.”); *Tuffendsam v. Dearborn County*
15 *Bd. of Health*, 385 F.3d 1124, 1126 (7th Cir. 2004) (“[The Constitution] limits the powers of
16 government but does not give people legally enforceable rights to demand public services and
17 to obtain damages or other legal relief if the government fails to provide them.”) *Cf. Williams*
18 *v. Wood*, No. 06-55052, 2007 U.S. App. LEXIS 4884 at *2-3 (9th Cir. Mar. 1, 2007) (failure to
19 protect claim properly dismissed where plaintiff did not allege he had been assaulted or
20 threatened by other inmates “and his speculative and generalized fears of harm at the hands of
21 other prisoners do not rise to a sufficiently substantial risk of serious harm to his future health.”)
22 (citing *Farmer v. Brennan*, 511 U.S. 825, 843 (1994)). Instead, plaintiff’s claims against

01 Kerlikowske are vague and conclusory and do not plausibly suggest entitlement to relief.

02 In sum, the Court concludes that plaintiff fails to state a claim against Kerlikowske.
03 The Court should, therefore, grant defendant's motion to dismiss.

04 CONCLUSION

05 For the reasons described above, Kerlikowske's motion to dismiss (Dkt. 93) should be
06 GRANTED. Plaintiff's claims against Kerlikowske should be DISMISSED.

07 DATED this 10th day of March, 2010.

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10 Mary Alice Theiler
11 United States Magistrate Judge
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